

September 20, 2022

Ms. Lynn Rubinstein
Executive Director
Northeast Recycling Council
139 Main St, Ste 401
Brattleboro, VT 05301
(Submitted Electronically)

**NERC/NEWMOA - Model Minimum Postconsumer Recycled Content Requirements
for Plastic Products and Packaging Legislation**

Dear Ms. Rubinstein,

The Flexible Packaging Association (FPA) applauds and supports your efforts in taking steps to proactively address the issue of minimum post-consumer recycled (PCR) content requirements. We believe that a suite of options is necessary to address plastics circularity and that well-crafted public policy is a major piece of that puzzle. Unfortunately, as currently drafted, FPA finds the NERC/NEWMOA proposed Model Minimum Postconsumer Recycled Content Requirements for Plastic Products and Packaging Legislation's definition of "Producer" is problematic and erroneously targets packaging manufacturers (converters) of plastic packaging, instead of the product manufacturers; specifically the second bullet point.

For over a year, FPA worked with the Product Stewardship Institute (PSI) and jointly drafted a set of principles to guide extended producer responsibility (EPR) for flexible packaging (<https://www.flexpack.org/publication/RG93bmxvYWQ6NDUx/download>). While the principles were technically drafted with EPR in mind, they remain applicable as the definition of "Producer" is critical to both EPR and PCR legislation for the same reasons. The PSI/FPA principles suggest the following in order to ensure the responsible party is correctly identified:

"Producer – means a party that has legal ownership of the brand of a product for sale, use, or distribution in the state, including online retailers who sell into the state, that utilizes plastic packaging.

(1) For plastic packaging, a producer shall be determined based on the following criteria:

(A) A person who manufactures a product under the manufacturer's own brand that uses plastic packaging;

(B) If subparagraph (A) does not apply, a person who is not the manufacturer of a product under the manufacturer's own brand that uses plastic packaging, but is the owner or licensee of a trademark under which plastic packaging is used in a commercial enterprise, sold, offered for sale or distributed in the state, whether or not the trademark is registered; or

(C) If subparagraphs (A) and (B) do not apply, a person who imports the product that uses the plastic packaging into the state for use in a commercial enterprise, sale, offer for sale or distribution in the state.”

The primary responsibility for ensuring that packaging meets state and local requirements for PCR content must be on the consumer packaged goods companies (CPGs), which encompasses food manufacturers and retailers in their role as brand owners. They, and not the producers of the packaging (converters), have the ability to track consumer sales in a given jurisdiction and control how products are made. Packaging producers (converters) would have no way to determine where the packaging is sold and even in some cases to what brand – packaging producers sell packaging to CPGs, which may then use it for multiple brands within their portfolio and sell throughout the country. Even when packaging is sold directly to a brand in a given state, packaging producers have no way of knowing whether the final product will be sold in or out of the state. This makes it impossible for packaging manufacturers (converters) to know which state’s standards (some of which contradict one another) they need to comply with. As PCR content laws vary considerably from one state to another, this would force packaging manufacturers (converters) to conform to whichever standards are harshest and most restrictive, to avoid facing penalties. This would also effectively allow one state to set public policy for others, particularly within the same region, by passing the most aggressive and restrictive standards. Even if this was a viable option, packaging manufacturers do not specify products for their CPG customers – CPGs (product manufacturers) specify this; converters cannot dictate what products CPGs offer or sell.

Similarly, to date, four states (ME, OR, CO, CA) have now passed laws establishing EPR programs for packaging, each with a distinctively different approach to EPR and some with PCR content mandates. All four states, however, share a common definition of “Producer” that correctly points to product manufacturers or CPGs, consistent with the PSI/FPA principles. Again, this is because it is simply infeasible, if not impossible, for a packaging manufacturer (converter) to predict or track where their product will end up and therefore have no way of determining which states’ standards to comply with, and even if they could, they are not specifying the product, they are merely making it under contracts with the product manufacturers.

For these reasons, FPA would strongly encourage you to amend the model legislation’s current definition of “Producer” so that it comports with the PSI/FPA elements, creating sound policy to address plastics circularity through a scientifically based, common sense approach. FPA stands ready to assist you in any way possible and if we can provide further information or answer any questions, please do not hesitate to contact us via phone at 410-694-0800 or via email at Akeane@Flexpack.org or SSchlaich@Flexpack.org.

Very Respectfully,

Sam Schlaich

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Flexible Packaging Association